Public Prosecutor v Ong Kia Chan

HIGH COURT (MELAKA) — CRIMINAL APPEAL NO 41–1 OF 2003
LOW HOP BING J
16 JUNE 2006

Criminal Procedure — Charge — Defective charge — Amended charge under s 41(1) of the Road Transport Act 1987 — Amended charge did not use the words contained in s 41(1) — Defects were never suggested in the court below — Whether accused misled in his defence — Whether can be cured under s 422 of the Criminal Procedure Code

Road Traffic — Dangerous driving — Causing death by dangerous driving — Whether prosecution has adduced sufficient evidence to satisfy the test laid down in established cases

This is an appeal by the learned public prosecutor against the decision of the learned magistrate ('the magistrate') who had on 24 December 2002, at the close of the defence case, acquitted and discharged the respondent (the accused) of the amended charge under s 41(1) of the Road Transport Act 1987 ('1987 Act'). On the day and at the time in question, the accused was in his bus where he had been transporting school children for about 10 years and so was familiar with the conditions on the road. He had parked his bus on a slightly steep slope. One of his passengers was SD2. Before the accused drove his bus, he looked to the front, left and right and asked SD2 sitting on the left row of his bus whether there were other students on the road. He mobilised his bus only upon confirmation that it was safe to do so. This was confirmed by SD2. However, when he moved his bus forward, he felt his bus had collided with something, at the gradient of 10°. Upon the collision, the accused stopped his bus and alighted to see the pupil under the wheel on the left front portion of the bus. In the course of hearing this appeal, the amended charge may be defective in two areas viz the year the 1987 Act was amended and the amended charge did not use the words contained in s 41(1). Learned deputy public prosecutor, while conceding the existence of the aforesaid two defects nevertheless submitted that the errors and omissions in the amended charge have neither misled nor prejudiced the respondent. The learned defence counsel who had not raised the defects in the court below nevertheless contended that the amended charge had been badly framed and was not curable under s 422 of the Criminal Procedure Code ('CPC'), as the 1987 Act was not amended in 2000 and that the words in s 41(1) were not followed, as a result of which the accused was misled, relying on s 154 CPC.

Held, dismissing the appeal:

(1) In the instant appeal, as it had never been suggested in the court below that the defects (arising from errors in the year the amendment came into force and the

wording) had in any way misled the accused, they are thus covered by s 156 CPC. The question that needs to be addressed herein is whether given the aforesaid defects in the charge (which should had been detected by the prosecuting officer or the defence counsel as officers of the court below, and/or the learned magistrate), can the accused be said to have been misled in his defence? The aforesaid defects were not so substantial as to results in the accused being misled in his defence which had been conducted without any hitch. These are minor defects which may be cured under s 422(a) of the CPC (see paras 65, 70).

(2) The issue that calls for determination in this appeal is whether, upon a maximum evaluation of the evidence at the close of the defence case, the prosecution has succeeded in establishing a case of dangerous driving beyond reasonable doubt or it has been rebutted by the defence case. Throughout the entire proceedings, the prosecution has focused on the case of dangerous driving against the accused. On the finding of facts, it is difficult to see how the prosecution has adduced sufficient evidence to satisfy the test as set out in *Ramiah v Public Prosecutor* [1972] 2 MLJ 258 or in *Lim Chin Poh v Public Prosecutor* [1969] 2 MLJ 159. The magistrate has therefore correctly found the accused not guilty of the offence of dangerous driving at the close of the defence case (see paras 42–44).

[Bahasa Malaysia summary

Ini adalah rayuan pendakwa raya yang bijaksana terhadap keputusan majistret yang bijaksana ('majistret tersebut') yang telah pada 24 Disember 2002, setelah penutupan kes pembelaan, membebaskan dan melepas responden (tertuduh) atas pertuduhan yang dipinda di bawah s 41(1) Akta Pengangkutan Jalan 1987 ('Akta 1987 tersebut'). Pada hari dan waktu tersebut, tertuduh berada di dalam basnya di mana dia mengangkut kanak-kanak sekolah untuk 10 tahun dan dengan itu tahu benar dengan keadaan jalan tersebut. Beliau telah meletakkan basnya di satu jalan yang curam. Salah seorang penumpangnya ialah SD2. Sebelum tertuduh memandu basnya, dia telah lihat ke hadapan, sebelah kiri dan kanan dan meminta SD2 yang duduk di sebelah kiri basnya sama ada terdapat kanak-kanak sekolah di jalan tersebut. Beliau telah menjalankan basnya hanya apabila diberitahu bahawa ia adalah selamat untuk berbuat demikian. Perkara ini disahkan oleh SD2. Akan tetapi, apabila dia mengerakkan basnya ke depan, dia terasa basnya melanggar dengan sesuatu, pada kecerunan 10°. Setelah melanggar, tertuduh berhentikan basnya dan keluar untuk melihat seorang pelajar di bawah tayar kiri depan basnya. Dalam pendengaran rayuan ini, pertuduhan yang dipinda berkemungkinan cacat di dua tempat iaitu tahun Akta 1987 dipinda dan pertuduhan yang dipinda tidak menggunakan perkataan-perkataan yang terkandung di s 41(1). Pendakwa raya yang bijaksana, walaupun mengaku kedua-dua kecacatan tersebut, tetapi menghujahkan bahawa kesilapan dan ketinggalan pertuduhan yang dipinda tidak memperdaya atau memprejudiskan responden. Peguamcara defendan yang bijaksana tidak membangkitkan kecacatan-kecacatan di mahkamah bawahan tetapi menghujahkan bahawa pertuduhan yang dipinda tidak digubal dengan betul dan tidak dapat diperbetulkan di bawah s 422 Kanun Acara Jenayah ('KAJ'), oleh kerana Akta 1987

tidak dipinda pada tahun 2000 dan perkataan-perkataan di s 41(1) tidak diikuti, dengan itu tertuduh diperdayakan, berdasarkan s 154 KAJ.

Diputuskan, menolak rayuan tersebut:

(1) Dalam rayuan ini, oleh kerana ia tidak pernah dicadangkan di mahkamah bawahan bahawa kecacatan-kecacatan (yang timbul daripada kesilapan tahun pindaan berkuatkuasa dan perkataan tersebut) telah memperdaya tertuduh, dengan itu mereka diliputi oleh s 156 KAJ. Soal yang patut ditanya di sini ialah: sama ada memandangkan kecacatan-kecacatan di pertuduhan (yang sepatutnya dikesan oleh pegawai pendakwa ataupun peguamcara pembelaan sebagai pegawai-pegawai mahkamah bawahan, dan/atau majistret yang bijaksana), bolehkah tertuduh dikatakan diperdaya di dalam pembelaannya? Saya berpendapat bahawa kecacatan-kecacatan seperti yang dinyatakan adalah tidak begitu penting yang dapat menyebabkan tertuduh diperdaya dalam pembelaannya yang telah dijalankan tanpa sebarang halangan. Kesemua ini merupakan kecacatan yang kecil dan dapat diperbetulkan di bawah s 422(a) KAJ (lihat perenggan 65, 70).

(2) Isu yang dipanggil untuk diputuskan di dalam rayuan ini ialah sama ada, setelah penilaian maksima bukti pada penamatan kes pembelaan, pendakwa telah berjaya mewujudkan satu kes memandu secara membahayakan melampaui keraguan munasabah ataupun ia telah dipatahkan oleh kes pembela. Sepanjang keseluruhan prosiding, pendakwa menumpukan satu kes memandu secara membahayakan terhadap tertuduh. Dalam penemuan fakta-fakta, adalah sukar untuk dilihat bagaimana pendakwa dapat mengemukakan bukti yang secukupnya untuk memenuhi ujian yang dibentangkan di dalam kes *Ramiah v Public Prosecutor* [1972] 2 MLJ 258 ataupun kes *Lim Chin Poh v Public Prosecutor* [1969] 2 MLJ 159. Majistret dengan itu adalah betul dalam penemuannya bahawa tertuduh tidak bersalah atas kesalahan memandu secara membahayakan setelah penutupan kes pembelaan (lihat perenggan 42–44).]

Notes

For cases on causing death by dangerous driving, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 23–25.

For cases on defective charge, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1010–1040.

Cases referred to

Abdul Hamid bin Udin v PP [2000] 6 MLJ 334 (refd)
Balachandran v PP [2005] 2 MLJ 301 (refd)
Chan Chong v PP [1957] MLJ 246 (refd)
Lau Lim Peng v PP [1968] 2 MLJ 14 (refd)
Lee Chiang Seng & 9 Ors v PP [1967] 2 MLJ 32 (refd)
Lim Chin Poh v PP [1969] 2 MLJ 159 (refd)
Loot Kow Choi & Anor v PP [2003] 1 CLJ 734 (refd)
Mat v PP [1963] MLJ 263 (refd)

Murugiah v PP [1941] MLJ 17 (refd)
PP v Cheong Kam [1946] MLJ 12 (refd)
PP v LKI Holidays Leisure Sdn Bhd [1998] 1 MLJ 315 (refd)
PP v Lee Hong Kee [1969] 2 MLJ 60 (refd)
PP v Lee Pak [1937] MLJ 265 (refd)
PP v Low Yong Ping [1961] MLJ 306 (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393 (refd)
PP v Syed Bakri [1955] MLJ xvii (refd)
Ramiah v PP [1972] 2 MLJ 258 (refd)
Tan Seow Pong & Ors v PP [1988] 2 MLJ 563 (refd)
Tay Leong Siak v PP [2002] MLJU 197 (refd)
Tan Thang Sang v PP [1975] 1 MLJ 204 (refd)
Wong Ah Kee v PP [1948–1949] Supp MLJ 23 (refd)
Wong Poh Ching v PP [1957] MLJ 160 (refd)

Legislation referred to

Criminal Procedure Code ss 152, 153, 154, 156, 158, 422
Dangerous Drugs Act 1952
Excise Enactment s 13(i)
Motor Vehicles Enactment (Cap 168) s 45(iv)
Road Traffic Ordinance 1958 s 34A
Road Traffic Ordinance 1961 [Sing] s 50
Road Transport Act 1987 s 41(1)

[*Editorial Note*: Whilst the Road Transport Act 1987 was amended in 1999 vide Act A1065, and therefore should rightly be cited as 'Road Transport (Amendment) Act 1999', s 7 of the amending Act, which amended the old s 41, only came into force on 18 April 2000. For details, please refer to PU(B) 94/2000].

Shazreen bte Mohd Hattan (Deputy Public Prosecutor, Pejabat Penasihat Undang-Undang Negeri Melaka) for the prosecution.
LK Tiu (Koh Kim Leng & Co) for the respondent.

Low Hop Bing J:

APPEAL

[1] This is an appeal by the learned public prosecutor against the decision of the learned magistrate ('the magistrate') who had on 24 December 2002, at the close of the defence case, acquitted and discharged the respondent (the accused) of the amended charge under s 41(1) of the Road Transport Act 1987.

THE CHARGE AS AMENDED

> Bahawa kamu pada 11 Mei 2000, jam 1.10 petang, di Jalan Penghulu Abbas, Bukit Baru, di dalam daerah Melaka Tengah, di dalam Negeri Melaka, sebagai pemandu m/bas, No pendaftaran WBX 1029, telah memandu kenderaan tersebut di atas jalanraya dengan cara yang membahayakan tanpa mengambil kira keadaan dan kesesakan lalu lintas, sehingga

menyebabkan kematian kepada Nur Najirah binti Ambrah, KP No 861106-30-5238. Oleh yang demikian, kamu telah melakukan satu kesalahan dan boleh dihukum di bawah s 41(1) Akta Pengangkutan Jalan 1987 (Pindaan) 2000.

(Emphasis added.)

[My translation:

That you on 11 May 2000, at 1.10pm, Jalan Penghulu Abbas, Bukit Baru, in the district of Melaka Tengah, in the state of Melaka, as a driver of a motor bus, registration No WBX 1029, did drive the said vehicle on the road in a manner which endangers without having regard to the condition and amount of traffic, thereby causing the death of Nur Najirah binti Ambran, NRIC No 861106-30-5238 and that you have thereby committed an offence punishable under s 41(1) of the Road Transport Act 1987 (Amendment) 2000.

(Emphasis added.)

[2] The relevant portion of s 41(1) reads as follows:

Bahasa Malaysia:

41. Menyebabkan kematian kerana memandu dengan... membahayakan.

(1) Mana-mana orang yang memandu suatu kenderaan motor di jalan... dengan cara yang, *setelah mengambil perhatian* tentang segala hal keadaan (termasuk jenis, keadaan dan saiz jalan, dan kesesakan lalu lintas yang dijangkakan yang ada atau mungkin ada di jalan itu) adalah *merbahaya* kepada orang awam, menyebabkan kematian mana-mana orang, adalah melakukan suatu kesalahan dan...

(Emphasis added.)

In English:

41. Causing death by... dangerous driving.

(1) Any person who, by the driving of a motor vehicle on a road... in a manner which *having regard* to all the circumstances (including the nature, condition and size of the road and the amount of traffic which is or might be expected to be on the road) is *dangerous* to the public, causes the death of any person shall be guilty of an offence and...

(Emphasis added.)

[3] In the course of hearing this appeal, I noted that the amended charge may be defective in two areas viz the year the Road Transport Act 1987 was amended and the amended charge did not use the words contained in s 41(1). I therefore requested both the learned deputy public prosecutor and defence counsel to advise me accordingly on the defects found in the charge.

[4] Learned deputy public prosecutor, Miss Shazreen bte Mohd Hatta while conceding the existence of the aforesaid two defects nevertheless submitted that the errors and omissions in the amended charge have neither misled nor prejudiced the respondent. She relied on *Public Prosecutor v Lee Pak* [1937] MLJ 265 and ss 152 to 154 of the Criminal Procedure Code, adding that the defects were merely irregular and not illegal, in which case ss 156 and 422 would apply. Support was sought in

A *Abdul Hamid bin Udin v Public Prosecutor* [2000] 6 MLJ 334 (HC); *Public Prosecutor v Lee Hong Kee* [1969] 2 MLJ 60 (HC); *Lee Chiang Seng & 9 Ors v Public Prosecutor* [1967] 2 MLJ 32 (HC); *Wong Ah Kee v Public Prosecutor* [1948–1949] Supp MLJ 23 (HC); *Tan Seow Pong & Ors v Public Prosecutor* [1988] 2 MLJ 563 (HC); and *Wong Poh Ching v Public Prosecutor* [1957] MLJ 160 (HC).

B

[5] A reference hereinafter to a section is a reference to that section in the Criminal Procedure Code unless otherwise stated.

[6] Mr LK Tiu learned defence counsel who had not raised the defects in the court below nevertheless contended that the amended charge had been badly framed and C was not curable under s 422, as the 1987 Act was not amended in 2000 and that the words in s 41(1) were not followed, as a result of which the accused was misled, relying on s 154; *Lee Pa*, *Chan Chong v Public Prosecutor* [1957] MLJ 246; *Public Prosecutor v Syed Bakri* [1955] MLJ xvii; *Tay Leong Siak v Public Prosecutor* [2002] MLJU 197 (HC); and *Public Prosecutor v LKI Holidays Leisure Sdn Bhd* [1998] 1 D MLJ 315 (HC).

[7] In the light of the above submissions relating to the charge in question, it becomes necessary for me to reaffirm the relevant principles governing the drafting of a charge under the Criminal Procedure Code, as follows:

E (1) Every charge shall state the offence with which the accused is charged: s 152(i);

(2) If the law which creates the offence gives it any specific name the offence may be described in the charge by that name only: s 152(ii); otherwise, so much of the definition of the offence must be stated as to give notice of the matter with which he is charged: s 152(iii); *Syed Bakri*, *Chan Chong*, *Tay Leong Siak*, F and *LKI Holidays Leisure*;

(3) The law and section thereof against which the offence is said to have been committed shall be mentioned in the charge: s 152(iv);

(4) The charge shall contain such particulars as to the time and place of the alleged G offence and the person, if any, against whom or the thing, if any, in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged: s 153(i).

(5) When the nature of the case is such that the particulars mentioned in ss 152 and 153 above do not give the accused sufficient notice of the matter with H which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose: s 154;

(6) No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be I regarded, at any stage of the case as material unless the accused was in fact misled by such error or omission: s 156; and

(7) Any court may alter or add to any charge at any time before judgment is pronounced (s 158(i)) and such alteration or addition shall be read and explained to the accused: s 158(ii).

[8] In relation to the charge in question, the prosecution had erred in stating that the amendment to the 1987 Act was effected in 2000 when there was no such amendment. The prosecution conceded that the amendment was effected in 1999. **A**

[9] The next defect in the charge was in the use of the word 'membahayakan' ('endangers') and 'tanpa mengambil kira' ('without having regard') as opposed to the words 'adalah merbahaya kepada awam' ('dangerous to the public') and 'having regard' respectively provided for in s 41(1). **B**

[10] The above defects seem to contravene s 152(1), (2), (4); and s 154.

C

[11] In *Lee Pak*, there were several defects on the face of the charge under s 45(iv) of the then Motor Vehicles Enactment (Cap 168). Whitley Ag CJ observed at p 353 that the charge should show the accused with particularity the case which he has to meet, and should not leave him guessing as to which of a variety of alternatives he is alleged to have offended against; and that it is desirable that before the charge is put to the accused the magistrate should satisfy himself as to whether in his opinion it is on the face of it properly framed. **D**

[12] In the instant appeal, as it had never been suggested in the court below that the defects (arising from errors in the year the amendment came into force and the wording) had in any way misled the accused, I am of the view that they are covered by s 156, as alluded to in principle 6 above. **E**

[13] Where the accused had been correctly charged with the offence of possession of cannabis under the Dangerous Drugs Act 1952 but there was an error in stating the wrong section number, Abdul Wahab J held at pp 346H–347A that the accused had not been misled in his defence. **F**

[14] No miscarriage of justice would result from a technically incorrect charge where the accused had not been misled: per Chang Min Tat J (later FJ) at p 61G left column in *Lee Hong Kee*.

G

[15] Similarly, where the ingredients of the particular offence under s 50 of the Singapore Road Traffic Ordinance 1961 have been clearly set out, any mistake in referring to the section was held to be not so defective: per Winslow J in *Lee Chiang Seng*.

H

[16] The omission of the word 'knowingly' in a charge under s 13(i) of the then Excise Enactment which had not embarrassed the accused was held to be curable under s 422: per Evans J in *Wong Ah Kee* (see also *Tan Seow Pong & Ors* per Chan Seek Keong JC (now CJ Singapore) at p 567; and *Wong Poh Ching* per Thomson J at p 160). **I**

[17] The question that needs to be addressed herein is: whether given the aforesaid defects in the charge (which should have been detected by the prosecuting officer or the defence counsel as officers of the court below, and/or the learned magistrate),

A can the accused be said to have been misled in his defence? I am of the view that the aforesaid defects are not so substantial as to result in the accused being misled in his defence which had been conducted without any hitch. These are minor defects which may be cured under s 422(a) which where relevant reads:

B
> ... no finding... or order passed or made by a court of competent jurisdiction shall be reversed or altered on account of —
>
> (a) any error, omission or irregularity in the charge... under this Code;
>
> (b) ... unless such error, omission, irregularity,... has occasioned a failure of justice.

C **[18]** Having disposed of the issue arising from the defects in the charge, I shall now consider the appeal on its merits.

INGREDIENTS OF THE CHARGE

D **[19]** The precursor of the offence of causing death by dangerous driving under s 41(1) was s 34A of the Road Traffic Ordinance 1958. Hence, judgments in which s 34A had been considered would remain immensely important and useful.

[20] As the appeal concerns issues which are of enormous importance to the
E magistrates hearing such cases, it is appropriate for me to set out the relevant principles governing 'dangerous driving', as follows:

(1) In a case of dangerous driving, the prosecution must establish that:

(a) a situation created by the accused is dangerous e.g. turning right into the side road without stopping to give way to through traffic; and

F

(b) when creating such a situation the accused was at fault. Fault involves a failure; a falling below the care and skill of a competent and experienced driver in relation to the manner of driving and the relevant circumstances (per Raja Azlan Shah J (now HRH the Sultan of Perak) in *Ramiah v Public Prosecutor* [1972] 2 MLJ 258 at pp 258–259.

G

(2) The expression 'driving in a manner which is dangerous to the public' indicates some dangerous act or manoeuvre on the part of the driver of a vehicle e.g. overtaking a vehicle on the wrong side of it, or overtaking in the face of oncoming traffic, or overtaking when unable to see oncoming traffic, or crossing a junction against traffic light, and so on. There must be some positive
H act on the part of the driver which is dangerous having regard to all the circumstances (per Choor Singh J (Singapore) in *Lim Chin Poh v Public Prosecutor* [1969] 2 MLJ 159 at p 161F to I right column.

(3) It is impossible to define 'dangerous driving' and the legislature has quite
I rightly not attempted to do so. Driving can become dangerous in an infinite variety of circumstances, one of which is leaving one's own proper side of the road and getting into the path of an oncoming vehicle. Such an act has potentially fatal consequences in the vast majority of cases, and there can be no two views about it being 'dangerous': per Ong J (later CJ (Malaya)) in *Public Prosecutor v Low Yong Ping* [1961] MLJ 306 at p 307;

(4) In the absence of any explanation to the contrary, a driver who drives a vehicle in a speed limit area at such a speed and in such a manner as to be unable to avoid overturning at a bend which is known to be dangerous, and running from behind into another vehicle, is guilty of driving in a manner which is dangerous to the public: per Chang Min Tat J (later FJ) in *Lau Lim Peng v Public Prosecutor* [1968] 2 MLJ 14 at pp 14–15;

(5) To overtake a cyclist who is far from steady at the moment when a heavy lorry is approaching from the opposite direction is to take an unjustifiable risk and constitutes dangerous driving: *Public Prosecutor v Cheong Kam* [1946] MLJ 12.

FINDING OF FACTS

[21] The judgment of Gopal Sri Ram JCA delivered for the Court of Appeal in *Loot Kow Choi & Anor v Public Prosecutor* [2003] 1 CLJ 734 clarified that the duty of a judge sitting alone (in this case, the magistrate) is to determine at the close of the prosecution's case as a trier of fact whether the prosecution has made out a prima fade case and that he must subject the prosecution evidence to maximum evaluation. This test was affirmed by the Federal Court in a judgment delivered by the same learned judge in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393. (See also *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 per Augustine Paul JCA (now FCJ) delivering the judgment for the Federal Court.

[22] The magistrate's finding of facts may be unfolded as follows.

[23] On 11 May 2000, SP1 a lance corporal was on duty at the enquiry office of the Melaka Tengah police traffic branch when the accused lodged a road accident report No 3588/2000 with him stating that his school bus had collided with a pupil underneath his bus. Subsequently, the pupil passed away at 3.50am on 12 May 2000.

[24] SP1 then informed the assistant investigating officer (SP2) of the accident. At 4.10pm 11 May 2000, SP2 together with a police photographer SP6, proceeded to and arrived at 4.35pm at the scene where he found the bus had been removed from its scene, Jalan Penghulu Abbas which was a straight road sloping towards the main road, near St David's School. SP2 found scratches and strands of hair there. The weather was fine and dry. SP2 met the accused there. SP2 prepared a sketch plan together with a key and directed SP6 to take three photographs at the scene. SP2 found no traces of blood or brake.

[25] At 8.45am 12 May 2000, SP2 proceeded to the hospital mortuary where he met the pupil's father SP3 and the doctor conducting the post-mortem, after SP3 had identified the pupil's body. SP2 directed SP6 to take two photographs of the body.

[26] Upon being informed of the death of the pupil, SP2 handed the case over to Inspector Razaleigh.

[27] Cross-examination of SP2 revealed that the road is a two-way traffic, 3.50 metres wide, accessible to motor buses, and that the accused's bus was at the

material time moving slowly, which SP2 agreed was not dangerous. He reaffirmed this under re-examination.SP2 agreed was not dangerous. He reaffirmed this under re-examination.

[28] The evidence of SP3 who was at home at the time of the accident did not relate to the manner in which the accident had occurred.

[29] SP4 who was at the scene at the material time had parked his Perodua Kancil car by the side of the road facing the main road. He waited in his car. There were many other waiting cars and motor cycles. He saw the accused's school bus ascending the steep slope from the main road, made a U-turn to face the main road, and parked about 20ft in front of SP4's car. The accused then alighted from his bus without switching off its engine. After five to six minutes, 50 to 60 school children were seen proceeding to their respective vehicles. The road was crowded and the vehicles could not move fast.

[30] SP4 saw the pupil adjusting her shoe laces by the side of the road about eight feet in front of the accused's bus, which then knocked the pupil, the point of impact being on the left of the bus. SP4 shouted to the accused, asking the accused to alight from his bus so as to see the pupil underneath, and the accused did. With the assistance of other female students, SP4 sent the pupil to the Melaka Hospital.

[31] Under cross-examination, SP4 confirmed that the accused was driving slowly, engaging the first gear. When re-examined SP4 also confirmed that the pupil was in a squatting position when the bus knocked her.

[32] The post-mortem report served by SP5 on the accused confirmed that the pupil died of severe injuries arising from a motor vehicle accident.

[33] At the close of the prosecution's case, the magistrate found that the prosecution has established a prima facie case for the accused to answer.

[34] The accused's evidence on oath revealed that he had been a bus driver for 22 years during which he had an unblemished driving record.

[35] On the day and at the time in question, he was in his bus at St David's School where he had been transporting school children for about 10 years and so was familiar with the conditions on the road. He had parked his bus on a slightly steep slope, by the side of a drain and his bus was facing Bukit Baru. One of his passengers was Chan Yit Sang (SD2). Before the accused drove his bus at 1.15pm, he looked to the front, left and right and asked his passengers sitting on the left row of his bus whether there were other students on the road. He mobilised his bus only upon confirmation that it was safe to do so. The road was not congested as there were not many students then. However, when he moved his bus forward, he felt his bus had collided with something, at the gradient of 10°. He did not see anything ahead of his bus and had engaged the first gear, moving at about 5 kmph.

[36] Upon the collision, the accused stopped his bus and alighted to see the pupil under the wheel on the left front portion of the bus. He found the impact was on the waist of the pupil, whom he first carried to his bus, until SP4 took the pupil to the Hospital. He testified that had he been aware of the presence of the pupil, he would not have mobilised his bus.

[37] The accused confirmed under cross-examination that SD2 was sitting on the first front seat on the left row of the bus.

[38] SD2 is a fifth former in the school. On the day in question, he was in the left front seat of the accused's bus, from where SD2 was able to see if there were school children on the left of the bus. When the road was clear, SD2 informed the accused who also made an observation of the left, right, front and rear of the bus, before driving his bus, slowly. He was not overtaking any other vehicle.

[39] The magistrate accepted the evidence of the accused and SD2, as having created a reasonable doubt and so acquitted and discharged the accused at the close of the defence case.

DEFENCE CASE

[40] Learned deputy public prosecutor submitted that the magistrate had erred in holding that the accused had raised a reasonable doubt in the prosecution's case and relied on *Public Prosecutor v Low Yong Ping*, *Lau Lim Peng v Public Prosecutor*, and *Ramiah v Public Prosecutor*.

[41] Learned defence counsel contended that the magistrate had the opportunity of hearing the witnesses and observing their demeanour and had arrived at a correct decision. The following authorities were cited:

(i) *Murugiah v Public Prosecutor* [1941] MLJ 17 (HC);

(ii) *Mat v Public Prosecutor* [1963] MLJ 263;

(iii) *Lim Chin Poh v Public Prosecutor*; and

(iv) *Tan Thang Sang v Public Prosecutor [1975] 1 MLJ 204* (HC).

[42] The issue that calls for determination in this appeal is whether, upon a maximum evaluation of the evidence at the close of the defence case, the prosecution has succeeded in establishing a case of dangerous driving beyond reasonable doubt or it has been rebutted by the defence case.

[43] It appears to me that throughout the entire proceedings, the prosecution has focused on the case of dangerous driving against the accused. On the above finding of facts, it is difficult to see how the prosecution has adduced sufficient evidence to satisfy the test as set out in *Ramiah* or in *Lim Chin Poh*.

A [44] The magistrate has therefore correctly found the accused not guilty of the offence of dangerous driving at the close of the defence case.

[45] In the circumstances, I affirm the order of acquittal and discharge, with the result that this appeal is hereby dismissed.

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Appeal dismissed.

Reported by Sally Kee

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